PUBLIC PROSECUTOR

v.

LAM SAN

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. YUSOFF MOHAMED SCJ
GUNN CHIT TUAN SCJ
[SC CRIMINAL APPEAL NO. 05-59-91]
23 SEPTEMBER 1991

CRIMINAL PROCEDURE: *Trafficking in dangerous drugs - Trial Judge amended charge to s. 39A(2) at close of prosecution case - Appeal by prosecution - Whether proper for Judge to do so - Evidence of chemist - Sketchy and unsatisfactory - Doubt as to weight of drugs but not as to identity - Whether doubt on a rational basis - Misdirection - Dangeroud Drugs Act, ss. 37(da), 39A(2).*

The respondent was originally charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). At the close of the prosecution case the learned trial Judge amended the charge to one punishable under s. 39A(2) of the Act to which the respondent pleaded guilty and was sentenced accordingly.

The issue in this case was whether on the evidence adduced, it was correct and proper for the learned Judge to amend the charge as he did after the close of the prosecution case. It was the contention of the appellant that the learned Judge erred in law and in fact when he concluded that the evidence of the chemist (PW5) was "sketchy" and "unsatisfactory" and therefore unacceptable. The reasons set out in the judgment of the trial Judge reflect the doubt in the mind of the Judge as to the accuracy of the weight of the heroin in relation to the presumption of trafficking under s. 37(da)(i) of the Act.

Held:

[1] Looking at the evidence of the chemist in its totality it was difficult to accept the doubt of the learned Judge at the close of the prosecution case to be a doubt arrived at on a rational basis. PW5 was a highly qualified chemist who had served the department of chemistry for 22 years and had testified as an expert witness in many Court cases.

[2] Unless there is evidence which is so inherently incredible that no reasonable person can believe it to be true it should be accepted as *prima facie* evidence. So long as the evidence is credible there is no necessity for the chemist to show in detail what he did in his laboratory. There was no need for the chemist to say what instrument he used for the purpose of the analysis or that the instrument was in good working condition. It had to be assumed that he had the proper instrument to carry out his work until the contrary is shown.

[3] If the Judge doubted the analysis itself as clearly seen in his grounds of judgment, the same queries he raised would equally apply to the nature or identity of the exhibit. In the circumstances, the doubt entertained by the learned Judge were not arrived at on reasonable or rational grounds and the test he applied to the evidence of the chemist on the question of the weight of the drugs was a misdirection.

[Appeal allowed; case remitted for calling of defence.]

[Bahasa Malaysia translation of headnote]

PROSEDUR JENAYAH : *Mengedarkan dadah berbahaya - Hakim perbicaraan meminda tuduhan ke s. 39A(2) pada penutupan kes pendakwaan - Rayuan oleh pendakwa - Sama ada Hakim patut melakukan sedemikian - Keterangan ahli kimia - Kasar dan tidak memuaskan - Keraguan mengenai beratnya dadah tetapi bukan mengenai identiti - Sama ada keraguan atas sebab-sebab yang rasional - Salah arah.*

Pihak responden pada asalnya telah dituduh di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta tersebut). Pada penutupan kes pendakwaan, Hakim yang arif telah meminda tuduhan kepada kesalahan di bawah s. 39A(2) Akta tersebut. Seterusnya, pihak responden mengaku bersalah dan telah diberi hukuman sewajarnya.

Isu dalam kes ini ialah sama ada berdasarkan keterangan yang dikemukakan, tindakan Hakim yang arif meminda tuduhan seperti yang dilakukannya selepas penutupan kes pendakwaan itu betul dan patut.

Adalah dipertikaikan oleh pihak perayu bahawa Hakim yang arif telah salah dalam undang-undang dan fakta apabila dia membuat kesimpulan bahawa keterangan ahli kimia (PW5) adalah 'kasar' dan 'tidak memuaskan' dan oleh kerana itu tidak dapat diterima.

Alasan yang dinyatakan oleh Hakim perbicaraan dalam penghakimannya mencerminkan keraguan pada fikiran Hakim mengenai ketepatan berat heroin itu berkaitan dengan anggapan pengedaran di bawah s. 37(da)(i) Akta tersebut.

Diputuskan:

[1] Berdasarkan keterangan ahli kimia itu pada keseluruhannya, adalah sukar untuk menerima keraguan Hakim yang arif pada penutupan kes pendakwaan sebagai keraguan yang dicapai atas sebab-sebab yang rasional. PW5 adalah seorang ahli kimia yang berkelayakan tinggi yang telah berkhidmat dengan Jabatan Kimia selama 22 tahun. Beliau juga telah memberi keterangan sebagai saksi pakar dalam banyak kes-kes Mahkamah.

[2] Kecuali jikalau terdapat keterangan yang begitu mustahil kewujudannya yang tidak seorangpun yang waras dapat mempercayainya sebagai benar, keterangan tersebut patut diterima sebagai keterangan prima facie. Asalkan keterangan itu boleh dipercayai, adalah tidak perlu bagi ahli kimia itu menunjukkan secara terperinci apa yang dilakukan dalam makmalnya. Adalah tidak perlu juga bagi ahli kimia itu menyatakan alat apa yang digunakan bagi tujuan analisis ataupun sama ada alat itu berada dalam keadaan bekerja yang sempurna. Mestilah dianggap bahawa beliau mempunyai alat yang sesuai untuk menjalankan kerjanya sehingga yang bertentangan ditunjukkan.

[3] Sekiranya Hakim meragui analisis itu, seperti yang jelas ditunjukkan dalam alasan penghakimannya, pertanyaan-pertanyaan sama yang dibangkitkannya akan juga terpakai kepada identiti dan sifat barang kes. Dalam keadaan ini, keraguan Hakim yang arif tidak dicapai atas alasan yang rasional atau munasabah dan ujian yang digunakannya berkaitan dengan keterangan ahli kimia atas soalan berat dadah itu telah disalah arah.

[Rayuan dibenarkan; kes diremit bagi tujuan memanggil pembelaan.]

Case referred to:
Munusamy v. PP [1987] CLJ (Rep) 221 ***(foll)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(da)(i), 39A(2), 39B(1)(a)

For the appellant - Stanley Isaacs, DPP
For the respondent - Teh Poh Teik; M/s. Abdul Rahman Saad & Associates

JUDGMENT

Hashim Yeop Sani CJ (Malaya):

The respondent was originally charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 for trafficking in 34.81 grammes of heroin at No. 84 Jalan Hashim, Muar, Johor. It was the prosecution evidence that when the police raided the house at the address stated in the charge a package containing what subsequently was certified by the chemist to be heroin was found near the respondent. At the close of the prosecution case the learned Judge amended the charge to one punishable under s. 39A(2) of the Act. The respondent pleaded guilty to the amended charge and was sentenced to 11 ½ years imprisonment with effect from the date of his arrest and the mandatory 10 strokes of the rotan.

There is really only one issue in this appeal by the public prosecutor. We are to concern ourselves only with the question whether on the evidence adduced it was correct and proper for the learned Judge to amend the charge as he did after the close of the prosecution case. It was the contention of the public prosecutor that the learned Judge erred in law and in fact when he concluded that the evidence of the chemist (PW5) was "sketchy" and "unsatisfactory" and therefore unacceptable.

In his brief written grounds of judgment the learned Judge sets out the reasons for his opinion for not accepting the evidence of the chemist as follows:

(a) There was no evidence as to why or how the chemist found the plastic packet to contain 75.18 grammes of greyish brown substance. There was also no evidence as to whether the chemist used an instrument for weighing the substance or if he did so use an instrument, how that instrument worked and whether it was in proper working order and duly serviced.

(b) There was no evidence as to how the analysis was conducted or as to who conducted the analysis to the end that the chemist found the substance to contain 34.81 grammes of heroin.

The rest of the reasons set out would appear to reflect the doubt in the mind of the learned Judge as to the accuracy of the weight of the heroin so as to invoke the presumption of trafficking under s. 37(da)(i) of the Act.

To see whether the learned Judge was justified in entertaining the doubt in his mind, we have to look at the evidence of the chemist. For convenience the relevant parts of the evidence in examination-in-chief of the chemist are reproduced below.

SD.5: Chang Eng Thuan a/s in English. 44 years old. Director of Chemistry of the State of Johor.

Obtained B.Sc. Hons. in Chemistry from U.M. Chartered Chemist C. Chem Awarded Fellow Royal Society of Chemistry FRCS from England. Fellow Malaysia Institute of Chemistry MMIC. Now serving as Council Member in that Institute. Represented Malaysia to attend the U.N. Narcotic Expert Group. Served in Dept. of Chemistry for 22 years. I have testified as expert witness in many Court cases. My evidence has all the time been accepted by the Court.

> All these envelopes sealed with police seal Polis Di R.M. 178. I examined all the 9 exhibits. In envelope A I found a plastic packet in which was a Chinese newspaper packet containing another plastic packet containing 75.18 grammes of a greyish brown substance which on analysis I found to contain 34.81 grammes nett of heroin.
>
> Heroin is a dangerous drug as defined in s. 2 of the DDA.
>
> The colour and texture of the contents of ID.8C are different from the time when I carried out the analysis. This is because when I carried out the analysis I had to powder the greyish brown substance into very fine powder for homogeneity of the analysis, to obtain an accurate result.
>
> In this case the % of error of heroin quantitative analysis is + - 1.0567% and I have given full benefit of the doubt to the accused by substituting 1.0567% from the % of heroin which I obtained from my analysis. The error would be positive or negative. We give benefit to the negative error.

In cross-examination the chemist said:

> From Ex. 8C I cannot remember exactly but I think I took out about 10 grammes for the purpose of analysis.
>
> There is no record in my work sheet of my having taken out a quantity of the substance for my analysis.

In re-examination he said:

> For the purpose of analysis the practice is to take out more than 10% of the weight of the sample for the analysis.

What seems clear from the grounds of judgment is that the learned Judge was satisfied with the other evidence from the prosecution. The learned Judge was also satisfied that PW5 was an expert and competent to give the evidence. It would seem that what the learned Judge was not satisfied with was the manner with which the chemist came to his conclusion.

Looking at the evidence of the chemist in its totality we found it difficult to accept the doubt of the learned Judge at the close of the prosecution case to be a doubt arrived at on a rational basis. PW5 was a highly qualified chemist who had served the department of chemistry for 22 years and had testified as an expert witness in many Court cases.

As to how a trial Court should approach the evidence of a chemist we wish to advert to the judgment of this Court in *Munusamy v. PP* [1987] CLJ (Rep) 221 where in a passage Mohd. Azmi SCJ on behalf of the Court put in focus the function of the chemist in a trial of this nature.

> We are therefore of the view, that in these type of cases where the opinion of the chemist is confined only to the elementary nature and identity of substance, the Court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step.

Two things are implicit in that passage. First, unless the evidence is so inherently incredible that no reasonable person can believe it to be true it should be accepted as *prima facie* evidence. Second, so long as the evidence is credible there is no necessity

for the chemist to show in detail what he did in his laboratory. In our view the evidence of the chemist in this case was more than sufficient as basis to call for the defence granted that all the other ingredients of the offence had been successfully proved.

The evidence of the chemist must be looked at in its totality. Seen in its totality the evidence of the chemist in this case is not sketchy at all. There is no need for him to say what instrument he used for the purpose of the analysis or that the instrument is in good working condition as we have to assume until contrary is shown that he had the proper instrument to carry out his work. In this case he had even gone to the extent of giving a margin of error and had given the benefit of the doubt to the respondent.

In his grounds of judgment the learned Judge adverted to an earlier case dealt by him in Criminal Trial No. 47-2-89. On examining his written judgment in that case (part of the appeal record) the learned Judge indicated in the judgment that the chemist must satisfy not only the nature or identity of the exhibit but also its weight which is a crucial ingredient to invoke the presumption of trafficking. In the present case he amended the charge at the close of the prosecution case to one of possession which can only mean that he was satisfied with the nature or identity of the exhibit (heroin) but had doubt in his mind as to the weight of the exhibit. But in our view if he doubted the analysis itself as clearly seen in his grounds the same queries he raised would equally apply to the nature or identity of the exhibit.

Therefore in our view the doubt entertained by the learned Judge was not arrived at on reasonable or rational grounds and the test he applied to the evidence of the chemist on the question of the weight of the drugs was a misdirection.

We accordingly allowed the appeal and directed that the case be remitted back to the learned Judge to call for the defence.

Also found at [1991] 3 CLJ 2410